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No. 01-223

IN THE
Supreme Court of the United States

CONSUMER FEDERATION OF AMERICA, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR TIME WARNER ENTERTAINMENT COMPANY, L.P. and AT&T CORP.

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November 2, 2001

QUESTION PRESENTED

The Federal Communications Commission ("FCC"), acting pursuant to 47 U.S.C. § 533(f), promulgated a regulation providing that no single firm may own cable systems serving more than 30% of the nation's subscribers.

The question presented is whether the court of appeals properly remanded the matter to the FCC for further consideration where the record lacked support for the key assumptions upon which the agency based the 30% limit.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents Time Warner Entertainment Company, L.P., and AT&T Corp. state as follows:

Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by AOL Time Warner Inc., a publicly held company. An ownership interest of more than 10% in Time Warner Entertainment Company, L.P., is directly or indirectly held by AT&T Corp., a publicly held company.

AT&T Corp. has no parent company. No publicly held company owns more than 10% of AT&T Corp.'s stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENTS .	ii
TABLE OF AUTHORITIES	v
STATEMENT	2
REASONS TO DENY THE WRIT:	
I. THE PETITION POINTS TO NO CIRCUMSTANCES WARRANTING FURTHER REVIEW	10
II. THE COURT OF APPEALS' DECISION IS CORRECT	12
CONCLUSION	17

TABLE OF AUTHORITIES

CASES	Page
California v. FCC, 905 F.2d 1217 (9th Cir. 1990)	10
FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978)	13, 14
Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000)	16
Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000), *cert. granted in part sub nom. Verizon Communications Inc. v. FCC*, 121 S. Ct. 877-79 (2001)	10
Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974)	11
Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989)	14
Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992)	10
Time Warner Entertainment Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001)	7
Turner Broadcasting System, Inc. v. FCC:	
512 U.S. 622 (1994)	6, 7, 11, 14
520 U.S. 180 (1997)	6, 14
United States v. O'Brien, 391 U.S. 367 (1968)	6

ADMINISTRATIVE DECISIONS

Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Further Notice of Proposed Rulemaking, CS Docket No. 98-82, *et al.*, FCC 01-263, 2001 WL 1104549 (rel. Sept. 21, 2001) 11

Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, 13 FCC Rcd 14462 (1998) 4

Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, Third Report and Order, 14 FCC Rcd 19098 (1999) . . 4

Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Rcd 8565 (1993) 3

CONSTITUTION, STATUTES, AND RULES

U.S. Const. Amend. I . . . . . *passim*

Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* 5

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 2

Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

47 U.S.C. § 402(a) 10

47 U.S.C. § 402(b) 10

47 U.S.C. § 533(f) 2, 17

47 U.S.C. § 533(f)(1) 9, 16

47 U.S.C. § 533(f)(1)(A) 2

47 U.S.C. § 533(f)(2) 16

47 U.S.C. § 533(f)(2)(A) 3, 9, 16

47 U.S.C. § 533(f)(2)(B) 17

47 U.S.C. § 533(f)(2)(C) 17

47 U.S.C. § 533(f)(2)(G) 17

28 U.S.C. § 2343 10

Sup. Ct. R. 10(a) 10

OTHER MATERIALS

Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, 65 Fed. Reg. 36382 (June 8, 2000) 3

Robert Stern, Eugene Gressman, Stephen Shapiro & Kenneth Geller, *Supreme Court Practice* (7th ed. 1993) 11, 14

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR TIME WARNER ENTERTAINMENT COMPANY, L.P. and AT&T CORP.

Petitioners seek review of a decision of the United States Court of Appeals for the District of Columbia Circuit setting aside an order of the Federal Communications Commission ("FCC") adopting a regulation prohibiting any single firm from owning cable systems serving more than 30% of subscribers nationally. The court of appeals held that the order was insufficiently reasoned and unsupported by the administrative record. Accordingly, the court of appeals remanded the case for further consideration.

Petitioners point to no special circumstances warranting further review. There is no conflict of authority, and the decision below is not of such broad significance as to merit review in the absence of a conflict. The court of appeals did not hold that the FCC may not adopt any subscriber limit. Because the FCC is currently attempting to address the deficiencies in a rulemaking on remand, the practical

significance of the decision below is limited. Moreover, the court of appeals did not announce any new principles: petitioners' quarrel is solely with the application of settled law. In light of these considerations, it is not surprising that the FCC itself has declined to seek review: only interest groups that intervened below have petitioned. It would be extraordinary for this Court to grant certiorari where review is not sought by, and is unwarranted in the view of, the agency directly affected.

Moreover, the decision of the court of appeals is correct. As the court of appeals concluded, a crucial step in the FCC's reasoning — that cable operators are likely to collude in denying carriage to new video programming services — is without any record support. The court of appeals was also correct in holding that the FCC's alternative rationale (if there was one) fails. That rationale — that a 30% limit is justified because splintering the nation's cable operators promotes a diversity of viewpoints — is entirely unhelpful in justifying any particular percentage limit. Besides, the court of appeals was plainly right in determining that the statute at hand, 47 U.S.C. § 533(f), does not permit reliance on this rationale.

Accordingly, the petition should be denied.

STATEMENT

1. In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460. The so-called subscriber-limits provision of that statute provides: "In order to enhance effective competition, the Commission shall . . . prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person." 47 U.S.C. § 533(f)(1)(A). The statute further provides that, "[i]n prescribing rules and regulations . . . , the Commission shall, among other public

interest objectives[,] . . . ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer." *Id.* § 533(f)(2)(A).

In the ensuing rulemaking, the FCC promulgated a regulation prohibiting any single firm from owning cable systems passing more than 30% of the total number of homes passed by cable systems nationally. *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 FCC Rcd 8565 (1993) (Pet. App. 53). According to the FCC, such a rule was necessary to prevent "the possibility that large horizontally integrated MSOs [Multiple System Operators — *i.e.*, cable companies owning multiple cable systems] might have the ability to preclude the launch of new video programming services." Pet. App. 66. The FCC did not explain, however, why that rationale implied a 30% limit, stating only that drawing the line at 30% reasonably balanced the stated concern against "the benefits and efficiencies that result from greater horizontal concentration." *Id.*[1]

Respondent Time Warner filed a petition for review in the D.C. Circuit. While that petition was pending, however, the FCC reopened its rulemaking. *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*,

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[1] The FCC stayed the effectiveness of its rule while the constitutionality of the statute was being litigated. *See* Pet. App. 92. The rule did not become effective until May 19, 2000, *see Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, 65 Fed. Reg. 36382 (June 8, 2000), and had been in effect for less than one year when it was set aside by the decision below.

Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, 13 FCC Rcd 14462 (1998) (Pet. App. 114). In October 1999 (after Time Warner filed its briefs explaining the shortcomings of the FCC's reasoning, but before the court of appeals could hear argument), the FCC issued a new order. *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order, 14 FCC Rcd 19098 (1999) (Pet. App. 254). In that order, the FCC reaffirmed the 30% cap.

For the first time, however, the FCC's October 1999 order sought to link the 30% line drawn to the previously expressed rationale — namely, that large cable companies might impede entry by new video programming services. The agency did so through the following chain of reasoning. *First*, the FCC estimated that a new video programming network "needs 15 million subscribers in order to have a reasonable chance to achieve economic viability." Pet. App. 283. The FCC calculated that 15 million subscribers represented about 20% of the total subscriber universe. *See id.* at 284. *Second*, the FCC estimated that, on average, a new video programming service would have only about a 50% success rate in gaining carriage even if cable operators did not act anticompetitively. *See id.* at 288. Based on these two steps, the FCC concluded that, to be viable, a new video programming service would need an "open field" of 40%. *Id.* at 289.

To the two steps described above, which still justified a cap no lower than 60%, the FCC then added a crucial third step. The FCC concluded that it should ensure new video programming services access to the requisite open field even if the two largest cable companies were to deny carriage "collusively." *Id.* at 290. Although the FCC did not point to any evidence that cable companies had ever colluded in denying carriage, it suggested that Congress itself had found collusive denial of

carriage to be a realistic threat. *See id.* at 284, 289. Moreover, the FCC said, the existence of this threat was an "assumption" that was "not unreasonable": cable operators that are "vertically integrated" might have "incentives" both "to reach carriage decisions beneficial to each other" and "to encourage one another to carry the same non-vertically integrated programming in order to share the costs of such programming." *Id.* at 284-85. And, the agency said, "[t]he probability of tacit collusion is higher with 2 competitors than 3 competitors." *Id.* at 289.

Thus, the FCC again settled on a 30% cap, which would yield a 40% open field even if the top two cable companies colluded in denying cable carriage. *Id.* The agency further noted that the 30% choice also had the consequence of "ensuring that there will be at least 4 MSOs in the marketplace." *Id.* at 290. That consequence was a "salutary" one, the FCC said, because, "[w]ith more MSOs making purchasing decisions," there would be an "increase[d] . . . likelihood that the MSOs will make different programming choices and a greater variety of media voices will therefore be available to the public." *Id.*

2. Respondents Time Warner and AT&T filed petitions for review of the October 1999 order in the D.C. Circuit, asserting that the FCC's choice of a 30% cap was inconsistent with the First Amendment, as well as the Administrative Procedure Act ("APA") and the subscriber-limits provision itself. *See* Pet. App. 2. In their brief, the FCC and the United States conceded that intermediate First Amendment scrutiny applied, *see* Brief for Respondents at 15-16, *Time Warner Entertainment Co. v. FCC*, No. 94-1035 (and consolidated cases) (D.C. Cir. filed Apr. 6, 2000) ("FCC Br."), but argued that the 30% limit could survive such scrutiny, *see id.* at 30-32. Petitioners in this Court (various interest groups) intervened in the court of appeals but did not file a merits

brief. Instead, petitioners filed a motion for leave to "adopt" the brief filed by the FCC and the United States.[2]

By a unanimous vote, the court of appeals set aside the FCC's subscriber-limits rule. *See* Pet. App. 1-29.[3] Applying the familiar standard for intermediate First Amendment scrutiny of *United States v. O'Brien*, 391 U.S. 367 (1968), and this Court's *Turner* decisions,[4] the court held that the FCC was required to show that the subscriber limit "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Pet. App. 5-6 (internal quotation marks omitted). This meant that the FCC would have to "'demonstrat[e] that the recited harms are real, not merely conjectural,'" *id.* at 6 (quoting *Turner I*, 512 U.S. at 664 (plurality opinion)), through "'reasonable inferences based on substantial evidence,'" *id.* at 10 (quoting *Turner I*, 512 U.S. at 666 (plurality opinion)).

The court of appeals acknowledged that, in a previous decision, it had rejected a facial First Amendment challenge to the *statute*, holding that the subscriber-limits statute was sufficiently tailored to "'the promotion of diversity in ideas and speech' and 'the preservation of competition.'" *Id.* at 6

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[2] *See* Motion of Center for Media Education, *et al.*, To Adopt Government's Brief, *Time Warner Entertainment Co. v. FCC*, No. 94-1035 (and consolidated cases) (D.C. Cir. filed Apr. 13, 2000). The motion was granted a few days later. *See* Order, *Time Warner Entertainment Co. v. FCC*, No. 94-1035 (and consolidated cases) (D.C. Cir. Apr. 18, 2000).

[3] The court of appeals also reviewed challenges to two other sets of FCC rules: the so-called channel-occupancy and attribution rules. *See* Pet. App. 17-22, 22-29. Petitioners do not challenge the court of appeals' rulings in connection with those rules.

[4] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

(quoting *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1319 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001)). But, the court held, "[c]onstitutional authority to impose some limit is not authority to impose any limit imaginable." *Id.* at 5. In particular, "the FCC must still justify the limits that it has chosen as not burdening substantially more speech than necessary. In addition, in 'demonstrat[ing] that the recited harms are real, not merely conjectural,' . . . the FCC must show a record that validates the *regulations*, not just the abstract statutory authority." *Id.* at 6 (quoting *Turner I*, 512 U.S. at 664 (plurality opinion)).

Applying these principles, the court of appeals determined that the FCC's decision to draw the line at 30% was unsubstantiated. The court assumed for purposes of its analysis the validity of the first two steps in the FCC's reasoning: that a new video programming service needs 20% of subscribers to be viable and that, given an average success rate of 50%, the service needs an "open field" of 40%. *See id.* at 7, 8-9. But those two steps alone, the court observed, could justify a cap no lower than 60%. *Id.* at 9. The FCC's selection of a 30% cap thus crucially depended on the third step in the FCC's reasoning: that two cable companies might act in concert to refuse to carry new programming services. *Id.* Again for purposes of discussion, the court assumed that this third step could lawfully support a 30% limit if the administrative record before the FCC demonstrated a non-conjectural risk of collusion. *See id.* at 8.

But the court of appeals found that there was no "record support for inferring a non-conjectural risk of collusive rejection." *Id.* at 9. At the outset, the court noted, the FCC could not rely on Congress to substantiate the risk of collusion: although the statute plainly authorized the FCC to act if, upon inquiry, it determined that collusion was a realistic problem, Congress had not made a finding that such

a risk existed. *See id.* And the court determined that, to the extent the FCC had made its own finding of likely collusion, that finding was unsubstantiated and unexplained. *See id.* at 10. As the court noted, the FCC never explained why vertical integration would result in collusion — a failure that was particularly troubling because the FCC had not pointed to a single real-world example of collusive denial of carriage. *See id.* Moreover, the FCC's reliance on "the economic commonplace that, all other things being equal, collusion is less likely when there are more firms" casts no light at all on "the question of what the appropriate horizontal limit is." *Id.*

Thus, the court of appeals concluded that the third step in the FCC's reasoning simply could not pass muster under the applicable level of scrutiny. Although the court acknowledged that "[s]ubstantial evidence does not require a complete factual record," *id.*, it found that "the FCC ha[d] put forth no evidence at all that indicates the prospects for collusion," *id.* at 11; *see also id.* at 17 ("the Commission has pointed to nothing in the record supporting a non-conjectural risk of . . . collusion").

The court of appeals next suggested that the FCC might have relied on an alternative justification: that, even if no risk of collusion existed, giving programming services at least four carriage opportunities would promote the interest of making available a diversity of voices. *See id.* at 13 (quoting the FCC's statement that a 30% cap would "serv[e] the salutary purpose of ensuring that there will be at least 4 MSOs in the marketplace"). But, the court concluded, this "more is better" diversity rationale was problematic in its own way.

As the court of appeals explained, "regulat[ing] the coincidental but independent actions of cable operators solely in the interest of diversity" might raise serious First Amendment concerns. *Id.* at 7. For one thing, any interest in splintering

cable operators to this end at some point could no longer "qualify as an 'important' governmental interest." *Id.* at 14. For another thing, "it would be odd to discover that although a newspaper that is the only general daily in a metropolitan area cannot be subjected to a right of reply, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), it could in the name of diversity be forced to self-divide." *Id.* But, the court determined, "[w]e need not face [this First Amendment] issue." *Id.* "[U]sing traditional tools of statutory interpretation," the court concluded, "Congress has not given the Commission authority to impose [a subscriber limit] solely on the basis of the 'diversity' precept." *Id.*

Carefully analyzing "[t]he relevant section," Section 533(f)(2)(A), the court of appeals noted that this provision instructed the FCC to address "only 'unfair[]' impediments to the flow of programming." *Id.* at 14-15 (brackets in original). The court concluded that "we cannot see how the word unfair could plausibly apply to the legitimate, independent editorial choices of multiple [cable companies]." *Id.* at 15. Moreover, the court explained, the FCC's reading "effectively deletes the word 'joint'" from the statutory phrase "because of joint actions by a group of operators." *Id.* Finally, the court noted, the sole purpose expressed in the statute was that stated in Section 533(f)(1): "to enhance effective competition." *See id.* at 16. Thus, the court concluded, the 30% limit simply could not be supported on a bare diversity rationale. *Id.* at 17.

For the first time participating on the merits, petitioners filed a petition for rehearing en banc, which was denied. *See id.* at 30-31. The instant petition for a writ of certiorari followed.

REASONS TO DENY THE WRIT

I. THE PETITION POINTS TO NO CIRCUMSTANCES WARRANTING FURTHER REVIEW.

Petitioners do not assert that the decision of the court of appeals conflicts with that of any other court of appeals, and they could not: there simply is no conflicting authority. To cushion the impact of this deficiency, petitioners suggest that, because the D.C. Circuit has "exclusive jurisdiction of many telecommunications cases," this Court could not expect there to be a conflict. Pet. 13 n.10; *see also* Pet. 15 n.13, 16 n.14. But the D.C. Circuit has exclusive jurisdiction with respect to only a small subset of communications cases, limited mostly to licensing-related appeals. *See* 47 U.S.C. § 402(b). All other FCC decisions, including rulemaking decisions like that here under review, can be appealed to any court of appeals. *See id.* § 402(a); 28 U.S.C. § 2343. Indeed, many of the most important communications decisions have come from circuits other than the D.C. Circuit.[5]

In the absence of a conflict of authority, certiorari would be appropriate only if there were extraordinarily compelling circumstances. *See* Sup. Ct. R. 10(a). There are none. Contrary to petitioners' implications, the court of appeals did not strike down any statute as unconstitutional and did not hold that the FCC may not adopt a subscriber-limits rule. Instead, the court of appeals held only that the record did not substantiate the 30% cap. The court remanded the matter for further consideration by the FCC, which, six weeks ago,

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[5] *See, e.g., Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *cert. granted in part sub nom. Verizon Communications Inc. v. FCC*, 121 S. Ct. 877-79 (2001) (Nos. 00-511, 00-555, 00-587, 00-590 & 00-602); *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

issued a notice of proposed rulemaking to that end.[6] Thus, the practical significance of the court of appeals' decision is limited at this time.

Additional review is further inappropriate because the court of appeals, far from announcing any new law, merely applied settled principles. In particular, the court subjected the FCC's reasoning to well-established principles of intermediate First Amendment scrutiny that the FCC itself acknowledged were controlling. These principles have long required agencies to demonstrate that speech-burdening rules are a narrowly tailored response to a real, non-conjectural problem shown to exist by substantial evidence. *See generally Turner I*, 512 U.S. at 666 (plurality opinion). Indeed, petitioners concede as much: they assert that the court of appeals applied First Amendment scrutiny that was "intermediate in theory, but strict in fact," Pet. 23, 29-30, thereby confirming that their quarrel is with the application of the "non-conjectural harm"/"substantial evidence" standard to the administrative record — not with the formulation of any legal principle. But, as this Court has held, "[t]he responsibility to assess the record to determine whether agency findings are supported by substantial evidence is not ours," but "primarily the task of the courts of appeals." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309 (1974); *see generally* Robert Stern, Eugene Gressman,

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[6] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, CS Docket No. 98-82, *et al.*, FCC 01-263, 2001 WL 1104549, ¶¶ 1, 7 (rel. Sept. 21, 2001) ("In *Time Warner Entertainment Co. v. FCC* [240 F.3d 1126 (D.C. Cir. 2001)], the United States Court of Appeals for the D.C. Circuit reviewed the Commission's cable television horizontal and vertical ownership limits and attribution benchmarks, and reversed and remanded the rules. . . . In accordance with our statutory mandate, First Amendment principles, and the . . . *Time Warner* decision, we now seek to reexamine our rules . . . .") (footnotes omitted).

Stephen Shapiro & Kenneth Geller, *Supreme Court Practice* 189 (7th ed. 1993) ("Stern & Gressman").

Petitioners nevertheless try to infuse the court of appeals' decision with broad significance by predicting that it will "bring immediate and sweeping changes to ownership concentration in *all* electronic media industries." Pet. 13. But most of the examples to which petitioners point consist of nothing more than instances in which courts granted preliminary relief or in which private parties made arguments in briefs or elsewhere. *See* Pet. 14-16. Besides, even if any ownership rules were in danger, that would be because those rules as currently framed cannot satisfy settled principles of intermediate First Amendment scrutiny — not because of any legal principle that the court of appeals announced for the first time in the decision below.

In light of the considerations set forth above, it is not surprising that the actual parties that suffered defeat below, the FCC and the United States, have declined to seek certiorari. If the expert agency charged with administering subscriber limits has determined that the court of appeals' decision does not undermine its programmatic objectives to such an extent as to warrant further review, then there is no cause for this Court to conclude otherwise.

II. THE COURT OF APPEALS' DECISION IS CORRECT.

The court of appeals not only applied settled principles of law to the record before it, but also did this correctly. The court of appeals correctly determined (and petitioners do not contest) that the FCC's attempt to justify a 30% cap (rather than a 60% cap) depended crucially on the FCC's finding that there was a risk of collusion. The court of appeals also correctly determined (and petitioners again do not contest) that the FCC was therefore required to demonstrate that, based on

reasonable inferences drawn from substantial evidence, the supposed collusion risk was real and not merely conjectural. Thus, petitioners' main quarrel with the court of appeals relates to the court's conclusion that the record facts to which the FCC pointed did not justify a finding of a realistic collusion risk.

Even ignoring that this fact-bound conclusion should be of no interest to this Court, it was unquestionably correct. The FCC pointed to *nothing* in the record to substantiate any likelihood of collusion. The agency did not identify a single real-world example of the kind of collusion that it supposedly feared: an agreement between cable firms not to provide cable carriage to a particular video programming service. Instead, the agency appeared to believe that there was no need for it to make any finding of a realistic collusion risk — on the mistaken theory that Congress had already made that finding for it. And the agency's own speculations were unsupported. The FCC's statement that vertical integration somehow breeds collusion was unexplained and is entirely unsupported by economic theory. And the FCC's reliance on the truism that collusion becomes more likely where there are fewer firms neither supported any finding that collusion of the particular kind feared posed a realistic threat nor helped explain at what level of concentration the threat would become intolerable.

Petitioners are simply wrong when they argue that the court of appeals' decision "conflicts" with decisions of this Court holding that, when an agency's factual determinations are of a "'judgmental or predictive nature,'" there is no need for "'complete factual support in the record.'" Pet. 25 (quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-14 (1978) ("*NCCB*")). The court of appeals expressly noted that "[s]ubstantial evidence does not require a complete factual record — we must give appropriate deference to predictive judgments that necessarily involve the

expertise and experience of the agency." Pet. App. 10 (citing *Turner II*, 520 U.S. at 196; *NCCB*, 436 U.S. at 814); *see also id.* at 9 ("[w]e give deference to the predictive judgments of Congress, see *Turner II*, 520 U.S. at 195-96 (citing *Turner I*, 512 U.S. at 665)"); *id.* at 27 ("given . . . the inevitable difficulty in picking . . . a number, and the deference due the Commission, we cannot find the choice of 33% arbitrary"). Thus, the "conflict" seen by petitioners could at most be implicit, which by itself disqualifies it from being a credible candidate for review. *See* Stern & Gressman 174.

In any event, there is no conflict, for the court of appeals' application of the intermediate scrutiny standard was entirely correct. Judicial deference to administrative agencies' predictive judgments is not unlimited. Even when reviewing predictive judgments of Congress — which are entitled to greater weight than those of agencies, *see Turner I*, 512 U.S. at 666 (plurality opinion) — courts have an independent obligation of review. As this Court stated in *Turner I*:

> That Congress' predictive judgments are entitled to substantial deference does not mean . . . that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does "not foreclose our independent judgment of the facts bearing on an issue of constitutional law."

Id. (quoting *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989)). Courts therefore must ensure that there are "reasonable inferences based on substantial evidence." *Id.* The court of appeals correctly determined that the FCC's predictions did not meet this test: the FCC's "predictive judgment" was based on "*no evidence at all.*" Pet. App. 11 (emphasis added).

Petitioners also wrongly argue that the court of appeals erred in holding that the FCC could not attempt to justify its 30% cap on the basis of a purely diversity-based rationale. At the outset, it is questionable whether the FCC even embraced such a rationale. The closest the FCC's order came to doing so was to say that "the 30% limit serves the salutary purpose of ensuring that there will be at least 4 MSOs in the marketplace," which the agency thought would "increas[e] the likelihood that the MSOs will make different programming choices and a greater variety of media voices will therefore be available to the public." *Id.* at 290. But that statement by its terms was no attempt to justify drawing the line *at 30%*. Indeed, the FCC's brief in the court of appeals never argued that drawing the line at 30% could be justified on a rationale independent from the agency's three-step competition-based rationale. Although the FCC's brief did point to the "at least 4 MSOs in the marketplace" passage in the order, it did so only in support of an argument that there should be *some* cap. *See* FCC Br. 32.

That the FCC did not rely on "programming diversity" to justify its choice of 30% as the appropriate limit is not surprising. As the court of appeals elsewhere noted, diversity considerations alone, although possibly helpful in justifying the proposition that there should be *some* subscriber limit, are entirely unhelpful in justifying a particular percentage line drawn in the face of intermediate scrutiny or even APA review. *See* Pet. App. 18 (FCC must explain "the conditions that make 50% too high and 30% too low"). For example, even if the FCC might cogently state that a diversity objective is served if there are "at least 4 MSOs in the marketplace," that does nothing to explain why the line should be drawn at four, and not at three or five.

In any event, the court of appeals correctly held that the FCC lacks statutory authority to regulate on the basis of a

bare "more is better" rationale. To the extent the FCC rested its cap on a diversity-based rationale at all, it did so in reliance on Section 533(f)(2)(A). *See id.* at 6, 14-15, 284. But that provision directs the FCC only to "ensure that no cable operator or group of cable operators can *unfairly* impede, either because of the size of any individual operator or because of *joint* actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer." 47 U.S.C. § 533(f)(2)(A) (emphases added). As the court of appeals correctly explained, a pure "more is better" rationale would read the terms "unfairly" and "joint" out of the statute. Pet. App. 15. Moreover, while the statute expressly mentions the purpose of "enhanc[ing] effective competition," 47 U.S.C. § 533(f)(1), it says nothing about any purpose of promoting diversity for its own sake. *See* Pet. App. 16.

Petitioners, in contrast, point to language in the lead-in sentence of Section 533(f)(2), which says that the FCC must pursue the listed objectives "among other public interest objectives." Pet. 18, 20. According to petitioners, "[t]his Court has consistently construed the term 'public interest' as embodying diversity." Pet. 18. At the outset, the FCC in its court of appeals brief never argued that this language authorized the agency to adopt a cap on a purely diversity-based rationale. Petitioners, which filed no merits brief, did not so argue until their petition for rehearing,[7] where it came too late.[8] Besides, petitioners do not explain how an indirect

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[7] *See* Petition of Intervenors Consumer Federation of America, *et al.*, for Rehearing or Rehearing *En Banc* at 5, *Time Warner Entertainment Co. v. FCC*, No. 94-1035 (and consolidated cases) (D.C. Cir. filed Apr. 16, 2001).

[8] *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 n.2 (2000) ("The Eighth Circuit declined to address this issue, since it had not been raised until the rehearing en banc . . . .

and implicit allusion of this kind can be enough where, as the court of appeals explained, the balance of Section 533(f) strongly militates against this reading.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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We similarly do not reach the issue here.").

[9] Petitioners also point to Sections 533(f)(2)(B), (C), and (G), *see* Pet. 19, but fail to explain how those subsections support their view. In any event, the FCC did not rely on these provisions in its brief below.